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No. 00-607

IN THE

Supreme Court of the United States

RONALD A. GRAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Armed Forces

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Institute of Military Justice ("NIMJ") respectfully submits this brief *amicus curiae* in support of the petitioner with regard to the second question presented. NIMJ takes no position on the first and third questions presented or the proper resolution of the second issue.

INTEREST OF THE *AMICUS CURIAE*

NIMJ is a District of Columbia nonprofit corporation organized in 1991.[1] Its overall purpose is to advance the fair administration of justice in the Armed Forces of the United States. NIMJ fosters improved public understanding by such means as publication of the *Guide to the Rules of Practice and Procedure for the United States Court of Appeals for the Armed Forces* and the monthly *Military Justice Gazette*, and the sponsorship of seminars and training programs. Notably, in 1998 NIMJ sponsored an international conference on "Continuity and Change in Military Justice," in London. *See* http://www.freeyellow.com/members/5/uppmlj/erflon.htm. NIMJ has also commented on and proposed changes to military procedural rules, testified before Congress, and appeared as an *amicus curiae* in the United States Court of Appeals for the Armed Forces and before this Court at the petition stage in *Clinton v. Goldsmith*, 526 U.S. 529 (1999). NIMJ's directors include law professors, private practitioners and other experts in the field, none of whom is currently on active duty, but nearly all of whom have served as active duty military lawyers, up to and including flag and general officer ranks. NIMJ is entirely independent of the government and relies exclusively on voluntary contributions for its programs.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus* made a monetary contribution to the preparation or submission of this brief.

Counsel for the parties have consented to the filing of this brief. Copies of their responses to our requests for consent have been lodged with the Clerk.

ARGUMENT

I

FOREIGN CASE LAW DEMONSTRATES THE IMPORTANCE OF DETERMINING WHETHER THE CONVENING AUTHORITY'S SELECTION OF MEMBERS IN CAPITAL COURTS-MARTIAL IS CONSTITUTIONAL

The second question presented concerns the constitutionality of Article 25(d)(2) of the Uniform Code of Military Justice ("UCMJ"), which directs convening authorities to select court-martial members who "are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. § 825(d)(2) (1994). Recent foreign cases address the issue of commanding officers' power to handpick court-martial members from among their subordinates. This jurisprudence indicates that the method of court-martial member selection is one of the most fundamental and important legal questions currently faced by military justice in democratic societies.

Petitioner points to the Canadian Supreme Court's decision in *R. v. Généreux*, [1992] 1 S.C.R. 259, and the European Court of Human Rights' decision in *Findlay v. United Kingdom*, 1997-I Eur. Ct. H.R. 263. Pet. at 21-22. *Findlay*, which held that the British Army Act 1955 violated the European Charter of Human Rights by allowing convening authorities to appoint court-martial members, is but one of a

series of European cases considering the issue. The European Commission of Human Rights similarly concluded that convening authorities' appointment of naval court-martial members deprived those tribunals of independence and impartiality in violation of Article 6 of the Charter. *Lane v. United Kingdom*, App. No. 27347/95 (Eur. Comm'n of H.R. Oct. 21, 1998), *available at* http://www.dhcour.coe.fr/Hudoc2doc2/HEREP/199910/27347r31.ex.doc.[2] The European Court reached a similar conclusion regarding Royal Air Force courts-martial. *Coyne v. United Kingdom*, 1997-V Eur. Ct. H.R. 1842.

The decisions invalidating the procedures for selecting British Army and Royal Navy court-martial members are particularly significant. John Adams, principal author of the 1775 Rules for the Regulation of the Navy of the United Colonies of North America and the 1776 Articles of War for the Continental Army, patterned both after their British counterparts. *See* 5 J. Cont. Cong. 670-71 n.2 (1776); 3 *Papers of John Adams* 147-56 (Robert J. Taylor ed., 1979). The Uniform Code of Military Justice thus shares a common ancestry with the British systems found insufficiently independent in *Findlay* and *Lane*.[3]

A South African court cited *Généreux* and *Findlay* in the course of holding that that country's courts-martial were insufficiently independent of the Executive Branch, although it did so on grounds other than the convening authority's selection of the members. *Freedom of Expression Inst. v. President, Ordinary Court Martial*, 1999 (3) BCLR 261

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[2] The Council of Europe's Committee of Ministers has adopted the Commission's conclusion. *See* Resolution DH (2000) 92 (Comm. of Ministers, Council of Eur. July 24, 2000), *available at* http://www.dhcour.coe.fr/Hudoc2doc2/HERES32/200010/eresdh2000.92.doc.

[3] The Canadian system invalidated in *Généreux* shares that common ancestor as well. *See* Eugene R. Fidell, *A World-Wide Perspective on Change in Military Justice*, 48 A.F. L. Rev. 195, 206 (2000) (noting that common law democracies trace their military justice systems to the British Articles of War).

(Cape High Ct.), *rev'd as moot*, 1999 (11) BCLR 1219 (CC).[4] On the other hand, when confronted with a constitutional challenge to its military justice system, the High Court of Australia considered but declined to follow *Généreux* in the course of holding that Australian general courts-martial are sufficiently independent. *Re Tyler; Ex parte Foley*, (1994) 181 CLR 18.

This body of foreign case law is significant in several respects. The decisions—and their distinct results—point to the issue's importance, complexity and persistence. In contrast, the Court of Appeals for the Armed Forces sought to resolve challenges to Article 25(d)(2)'s constitutionality in capital cases with a single paragraph in petitioner's case and a single paragraph in *United States v. Loving*. Pet. 131a-32a; 41 M.J. 213, 297 (1994), *aff'd on other grounds*, 517 U.S. 748 (1996). The issue merits deeper analysis.

Considering Article 25(d)(2)'s constitutionality will also allow the Court to revisit an important jurisprudential dispute: the proper role of foreign law in constitutional adjudication. Since the Court declared "comparative analysis inappropriate to the task of interpreting a constitution," *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997), a substantial body of commentary has emerged on the subject,[5] including some by

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[4] The Constitutional Court held that new military justice legislation had rendered the case moot. *President, Ordinary Court Martial v. Freedom of Expression Inst.*, 1999 (11) BCLR 1219 (CC). Under § 20 of that legislation, military assessors are appointed not by the commanding officer, but by the director of military judges or an officer appointed by the director, from a list maintained by the local representative of the Adjutant General. Military Discipline Supplementary Measures Act, No. 16 of 1999 (S. Afr.) (cited in Fidell, *supra* note 3, at 196 n.5).

[5] Some academic commentary advocates comparative analysis as a tool of constitutional interpretation. *E.g.*, Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on "Proportionality," Rights and Federalism*, 1 U. Pa. J. Const. L. 583 (1999); Mark Tushnet, *The Possibilities of*

members of the Court.[6]

II

THIS CASE PRESENTS THE OPTIMAL VEHICLE FOR ADJUDICATING THE CONSTITUTIONALITY OF ARTICLE 25(d)(2)

The issue of Article 25(d)(2)'s constitutionality is unlikely to percolate further in the lower courts. The Court of Appeals for the Armed Forces has disposed of it twice in opinions that offer little analysis. Pet. 131a-32a; *Loving*, 41 M.J. at 297. Nor will the issue be further developed on federal habeas review of a military death sentence. Because all military death row inmates are housed at the United States Disciplinary Barracks at Fort Leavenworth, Kansas, habeas review will be conducted under the Tenth Circuit's standard of review for collateral challenges to courts-martial. *See* Paul H. Turney, *New Developments in Military Capital Litigation: Four Cases*

Comparative Constitutional Law, 108 Yale L.J. 1225 (1999); Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 Ind. L.J. 819 (1999). Other commentary opposes the practice or urges caution in its use. *E.g.*, Seth F. Kreimer, *Commentary: Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. Pa. J. Const. L. 640 (1999); Alexander Somek, *The Deadweight of Formulae: What Might Have Been the Second Germanization of American Equal Protection Review*, 1 U. Pa. J. Const. L. 284 (1998).

[6] Stephen Breyer, *Constitutionalism, Privatization, and Globalization: Changing Relationships Among European Constitutional Courts*, 21 Cardozo L. Rev. 1045, 1060-61 (2000); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 54 Rec. of Ass'n of B. of City of N.Y. 278 (1999) ("comparative analysis emphatically *is* relevant to the task of interpreting constitutions and enforcing human rights") (emphasis in original), *reprinted in* 21 Cardozo L. Rev. 253 (1999); Sandra Day O'Connor, *Broadening Our Horizons: Why American Lawyers Must Learn About Foreign Law*, 45 Fed. L., Sept. 1998, at 20.

Highlight the Fundamentals, Army L., May 2000, at 103, 104 n.16. Under Tenth Circuit case law, federal habeas review will not reach the merits of an issue that was "given full and fair consideration by the military courts." *Lips v. Commandant, U.S. Disciplinary Barracks*, 997 F.2d 808 (10th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994). An issue that was raised before a military court is deemed "fully and fairly considered" even if that court rejected the claim without explanation. *Id.* at 812 n.2. Thus, absent review by this Court, the Court of Appeals for the Armed Forces' perfunctory resolution of Article 25(d)(2)'s constitutionality in capital cases will likely be the final word.

Despite the limited *judicial* consideration of Article 25(d)(2)'s constitutionality, the issue has been analyzed thoroughly. Numerous commentators have scrutinized the proper method of member selection.[7] Pursuant to a congressional directive, *see* Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 552, 112 Stat. 1920, 2023 (1998), in 1999 the Department of Defense issued a report recommending retention of the status quo. Dep't of Defense, Joint Service Comm. on Mil. Just., *Report on the Method of Selection of Members of the Armed Forces to Serve on Courts-Martial*

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[7] *See, e.g.*, James A. Young, III, *Revising the Court Member Selection Process*, 163 Mil. L. Rev. 1 (2000); Comment, *Reforming Court-Martial Panel Selection: Why Change Makes Sense for Military Commanders and Military Justice*, 7 Geo. Mason L. Rev. 1013 (1999); Guy P. Glazier, *He Called for His Pipe, and He Called for His Bowl, and He Called for His Members Three—Selection of Military Juries by the Sovereign: Impediment to Military Justice*, 157 Mil. L. Rev. 1 (1998); John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 Mil. L. Rev. 1, 25 (1998); Stephen A. Lamb, *The Court-Martial Panel Selection Process: A Critical Analysis*, 137 Mil. L. Rev. 103 (1992); David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 Mil. L. Rev. 1, 19-20 (1991); Kenneth J. Hodson, *The Manual for Courts-Martial 1984*, 57 Mil. L. Rev. 1 (1972); Joseph Remcho, *Military Juries: Constitutional Analysis and the Need for Reform*, 47 Ind. L.J. 193 (1972).

(Aug. 19, 1999). That recommendation conflicts with a previous Department of Defense analysis, which concluded that "the convening authority should play no part in the selection process," and that a system of random selection should be adopted. Dep't of Defense, *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 90 (1972) (quoted in Gary C. Smallridge, *The Military Jury Selection Reform Movement*, 19 A.F. L. Rev. 343, 351 (1978)). Thus, the question comes to the Court as thoroughly developed as it is likely ever to be.

The narrow scope of habeas review for court-martial convictions, *see Burns v. Wilson*, 346 U.S. 137 (1953), further supports a grant of certiorari. If a military death sentence were to reach this Court on appeal from a denial of habeas, the standard of review may not allow consideration of the merits of the petitioner's claims. The Court should therefore grant certiorari to ensure the issue's full consideration on direct review.

Finally, that this is a capital case makes it an especially appropriate vehicle for determining Article 25(d)(2)'s constitutionality. Resolution of this issue could, of course, affect capital and non-capital courts-martial alike. After all, *Généreux* and *Findlay* were both non-capital cases. But the Court may well hold that Article 25(d)(2) offends the Eighth Amendment's heightened reliability requirement for capital cases, *see Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion), and reserve for another day its constitutionality in non-capital cases. *Cf. Loving v. United States*, 517 U.S. 748, 774 (1996) (Stevens, J., concurring) (reserving application of *Solorio v. United States*, 483 U.S. 435 (1987), to capital cases). Such a holding would immediately affect only six cases. *See* Turney, *supra*, at 104. At the same time, it would provide guidance concerning the Court's view of Article 25(d)(2), thereby affording Congress and the President an opportunity to correct any constitutional defects before the Court is called upon to consider the issue in a non-capital case that could affect a far larger number of courts-martial.

CONCLUSION

For the foregoing reasons, certiorari should be granted as to the second question presented.

Respectfully submitted,

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